82-284

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the First Amendment rights of corporate employees and stockholders, and the First and Fifth Amendment rights of labor unions, are violated by provisions of the Federal Election Campaign Act construed by the lower court so as to

1) limit labor union federal election spending to moneys donated by members but allow corporations to spend both moneys donated by their stockholders and political payments pressured from their vulnerable career employees;

2) authorize employment-related pressures on career employees to induce their donations to the corporation's political fund; and

3) authorize the use of general assets to pay the operating costs of the corporate political fund without rebates to objecting stockholders.*

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* In addition to the International Association of Machinists and Aerospace Workers, the following parties appeared below as plaintiffs: William W. Winpisinger, Judy Reardon, Rebecca J. Ward, Anne S. Morrison, Alan B. Morrison, and Eugene Glover. In addition to the Federal Election Commission, Robert O. Tiernan appeared below as defendant in his capacity as Chairman of the Commission.

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JURISDICTIONAL STATEMENT

The International Association of Machinists and Aerospace Workers and six named individuals, appellants herein, appeal from the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on April 6, 1982, upholding the constitutionality of provisions of the FECA alleged to invade the First Amendment rights of corporate employees and stockholders and the First and Fifth Amendment rights of labor unions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which appears in the Appendix, p. 1a, *infra*, is not yet officially reported but has been published in 2 Fed. Elect. Camp. Fin. Guide (CCH) ¶ 9171. The order of the United States District Court for the District of Columbia certifying three separate constitutional questions for resolution by the Court of Appeals pursuant to 2 U.S.C. § 437h and entering findings of fact is unpublished and appears in the Appendix p. 64a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, finding no constitutional violations in the challenged FECA provisions, was entered on April 6, 1982. A notice of appeal to this Court was duly filed on April 21, 1982, and appears in the Appendix, p. 70a, *infra*. On June 29, 1982, Chief Justice Burger signed an order extending the time for docketing the case to and including August 19, 1982. The jurisdiction of this Court is invoked under 2 U.S.C. § 437h(b) which provides "any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments to the United States Constitution and the relevant provisions of the Federal Election Campaign Act, 2 U.S.C. §§ 437h and 441b, appear in the Appendix, p. 72a, *infra*.

STATEMENT OF THE CASE

Ever since the first protective legislation was adopted seventy-five years ago, federal law has barred corporations from spending institutional funds in federal election campaigns. In the view that a balance was required in the rules applicable to business and labor, first in 1943 and later in 1947 the ban on institutional spending for federal elections was extended to labor unions (that joint prohibition is codified at 2 U.S.C. § 441b(a)). In 1971, again maintaining parity between corporations and unions, the Federal Election Campaign Act (FECA) authorized an exception to the election spending ban. Both sides were permitted to solicit Political Action Committee (PAC) funds from their respective constituencies—the corporate stockholders and the union members. The Federal Election Commission's 1975 *SUNPAC* ruling, construing the statute to allow corporations also to solicit all their employees, led to 1976 amendments assertedly effective to restore the previous balance in the regulation of business and labor election spending rights. But in fact they have left the unions greatly disadvantaged vis-à-vis the corporations.

Nominally both sides are now precluded from spending their institutional funds in federal elections and authorized to spend only voluntary PAC contributions. But in actuality the ban on electoral spending with institutional funds now applies only to unions restricted to their members' voluntary contributions. For as construed and upheld below, the statute enables American corporations not only to use funds donated by their stockholders but also to raise funds from hundreds of thousands of vulnerable career employees, by pressuring their support to the institution which will determine their career opportunities and success. Due to the abstentionist position taken by the Commission concerning the use of employment-based

contribution pressures—to which the court below has given statutory and constitutional validation—corporations are now freed to use their institutional power over career employees to build political treasuries that can overwhelm the electoral process and the statutorily limited voice of labor. Thus the ruling below simultaneously sacrifices corporate employee liberty of political abstention and precludes the necessary even-handedness of the statute's election spending limitations upon corporations and unions.

1. *The Statutory History*

In 1907 Congress adopted the ban on corporate contributions in connection with federal elections out of concern that the massive financial power of corporations should not overwhelm our political system (Tillman Act, 34 Stat. 864 (1907)). Initially in 1943, and then permanently in 1947, Congress added labor organizations to the statutory ban under circumstances reviewed by this Court in *United States* v. *United Automobile Workers*, 352 U.S. 567, 570-84 (1957). Unions were added to the statutory ban in the view that parity is required in the election spending rules applicable to business and labor. As stated by Congressman Landis, author of the legislation that first extended the election spending ban to unions, the bill sought "to put labor unions on exactly the same basis, insofar as their financial activities are concerned, as corporations have been for years" (*id.* at 579).

Subsequent to the 1947 statute, although barred from using institutional funds, unions generally maintained their voice in federal elections by soliciting voluntary PAC donations from their members which they used for election contributions and expenditures. Validating that practice, an express exception to the ban on corporate and union election spending was adopted in 1971 authorizing

both unions and corporations to raise federal election PAC funds by solicitation of their respective constituencies—the union's members and the corporation's shareholders. Again the expressed intent of the Congressional sponsors was that "corporations and labor unions be treated absolutely equally" (117 Cong. Rec. 43382 (1971)).

As matters stood after 1971, corporations and unions remained singled out by a ban on the use of their institutional funds in federal elections, but an equivalently limited means was now available for both sides to obtain monies for federal election use: the nation's major corporations could solicit PAC funds from their 25 million stockholders while unions could solicit donations from their 21 million members. To assure that such PAC monies freed from the ban on federal election spending would be purely voluntary, the statute forbade a political action committee to make a contribution or expenditure of funds "secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal" (§ 205 of the Federal Election Campaign Act of 1971 [P.L. 92-225], 86 Stat. 10). In 1972 this Court went further in *Pipefitters' Local Union No. 562* v. *United States*, 407 U.S. 385, 413-14 (1972), construing the statute also to bar PAC solicitations "under circumstances inherently coercive" which might render a contribution less than a purely voluntary act even though not secured by threats of reprisal.

The parity of treatment which the federal law thus secured was abruptly broken in 1975 when the Federal Election Commission issued its *SUNPAC* opinion (A.O. 1975-23), permitting corporations to solicit employees who owe their livelihood to the company for payments to the employer's political fund. Though the Commission recognized that there is "a potential for coercion which is inherent in the employment relationship and which may be triggered by solicitation of employees by or

on behalf of an employer" (*id.* at 2), it concluded that the 1971 statute did not prohibit corporate solicitation of employees for PAC money.

The FEC's statutory reading was the subject of prompt congressional modification. It was immediately perceived that the balance of election spending limitations governing corporations and unions was threatened by the *SUNPAC* ruling, and that employees are psychologically vulnerable to employer solicitation—a perception reflected in the 1976 statutory amendments permitting corporate solicitation of hourly employees only through written solicitations under protected conditions of donor anonymity (2 U.S.C. § 441(b)(4)(B)). But as concerns career employees, the 1976 provision (2 U.S.C. § 441b(b)(2)) left all of the corporation's "executive or administrative personnel" within the reach of PAC solicitation without the arms-length protections that hourly employees were given. In the rush to enact the 1976 law to save the Commission from extinction in the wake of this Court's invalidation of the Commission's composition (*Buckley* v. *Valeo*, 424 U.S. 1 (1976)), there was little time for consideration of the potential imbalancing impact of this new departure.

The court below finds (*infra*, p. 30a), for instance, that Congress "apparently did not consider the difference in capacity between corporate and labor PACs when it formed the 1976 amendments." Indeed, whereas the House Committee version had provided only for corporate authority to solicit a handful of "executive officers," the broader Senate version prevailed with some confusion about the actual effect of what was enacted.[1] As noted by the ruling below (*infra*, pp. 20a-21a n.42), House leaders "believed mistakenly that the 1976 amendments simply restored the *status quo ante*." Thus, in great haste and

[1] As enacted, the 1976 provisions include not only employees with "policy making" or "supervisory" responsibilities but also those with "managerial" or "professional" responsibilities within the class of "executive or administrative personnel" (2 U.S.C. § 441b(b)(7)). The Conference Report explained that the broader definition is "in-

with no clear understanding, there was adopted a provision which has facilitated massive growth in corporate federal election spending financed with funds obtained by pressures on the employee that go far beyond the limited monies unions can obtain through their members' voluntary PAC donations.

2. *Corporate PAC Solicitation Methods Under the 1976 Amendments*

After the FEC dismissed, without investigation, appellants' administrative complaint concerning coercive PAC solicitation of corporate employees, appellants brought this action in the District Court and engaged in discovery concerning four of the nation's ten largest corporate PACs. That discovery demonstrates widespread use under the 1976 law of coercive techniques by which employment pressure is exerted on vulnerable career employees to maximize the number of contributors and the amounts of their contributions. A Dart Industries memorandum reveals the force of such pressure tactics (I. 103).[2] Conceding that few employees "if any, will voluntarily give money to a PAC unless they are compelled by a need," the memorandum explains that "we create a need for the individual to become a political activist through our PAC" which can induce employees to become contributors "not because of the purpose of the PAC, but because they feel a need to be part of the group." The record shows that each of the four corporations subjected to discovery below employs these pressure tactics in soliciting career employees.

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tended to include the individuals who run the corporation's business, such as officers, other executives, and plant, division, and section managers, as well as individuals following the recognized professions, such as lawyers and engineers, who have not chosen to separate themselves from management by choosing a bargaining representative" (H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. (1976), p. 62).

[2] "F" references are to the numbered findings of fact by the District Court. "I" references are to the numbered Items of the record certified by the District Court.

At Dart Industries, supervisor and peer pressure is used. Initially, employees receive notices that the corporation wants their money for political contributions to advance the company's business interests (F. 5-7). Then top Dart officials call the career employees into special small group solicitation meetings held at various company locations, usually during working hours (F. 28). While Dart refuses to disclose what it says to its employees at that time, the personal presentations doubtless underscore the repeated message of Dart's written solicitations: the company needs employee money to advance its business interests by political contributions. For some senior staff members who have not contributed even after the meetings, there is added the pressure of individual requests for payment from DARTPAC Treasurer Rhodes and from company Chairman Justin Dart (F. 36). The company has refused to disclose the numbers or identities of the employees whom Rhodes and Justin Dart have called upon for contributions, but it concedes the truth of Mr. Dart's statement to the Wall Street Journal that employees who don't give "get a sell" (I. 515(t)).

At Eaton Corporation, group sessions are used to induce career employees to contribute. When Eaton first set up its PAC in 1977, its top six hundred managers received letters stating that the company needed their PAC donations to advance its business interests through political contributions (F. 9-12, 14). Shortly thereafter, the same employees were called into unprecedented one and two hour group meetings by the senior officer at their work location to hear the message from the head of Eaton's PAC, and were admonished to "get into politics or get out of business" (F. 13, 29; I. 22, p. 2). As the company conceded in 1979: "Our face-to-face meetings with our managers were the most effective method of solicitation" for the corporate PAC (F. 30; I. 224). Like the earlier written solicitation, the presentation used at these group meetings underscores the company's business interest in receiving employee political donations (F. 13).

The message of these meetings was understood, for in its very first year of operation nearly 60% of those employees called to the meetings made contributions to the company PAC (F. 67).

United Technologies Corporation uses saturation solicitation and group meetings. The stream of written solicitations sent to United Technologies employees emphasizes that the company needs their donations in order to advance its business interests through election contributions (F. 15-20). Senior employees receive a letter signed by the Chairman and the President of UTC urging them to engage in political activity and endorsing the company's PAC (F. 45; I. 335). Soon employees receive a solicitation letter from the head of the PAC, which says that the company needs employee political donations to further its business interests (F. 17, 19). And after that the employee gets a letter from the President of his own subsidiary UTC corporation which adds a personal endorsement to the earlier donation requests (F. 18, 20, 46-50). Finally, and still within the few short weeks of these repeated solicitations, special meetings are convened at various company locations (lasting as long as 30 minutes, and often held at the workplace and during working hours), where employees get the personal message (F. 31). As the company conceded in 1979, these group meetings are a "most effective" method of solicitation for its PAC (F. 33; I. 391).

Winn-Dixie Stores, Inc., uses a special means of pressuring its employees. Winn-Dixie's written solicitations constantly emphasize that the employee's money is needed to further his employer's business interests (F. 23-27). Although Winn-Dixie does not call its employees into formal group meetings, it uses another solicitation device calculated to exert supervisory pressure. The manager of each division is told to prepare and sign a letter addressed individually to each of his senior employees asking him to make a contribution to the corporate PAC to further the company's business interests (F. 38). The division manager places this request in an envelope to-

gether with the employee's annual bonus check and then personally hands them to each employee he supervises (*id.*). Nowhere is the manager warned not to add a personal solicitation to the written request (*id.*, see F. 39), and when one such instance came to light through the work of an enterprising reporter it was grudgingly admitted by the corporation (F. 38). Finally, reports are sent to managers on which of their employees gave to the PAC and which did not (I. 526(r), 407, 419).

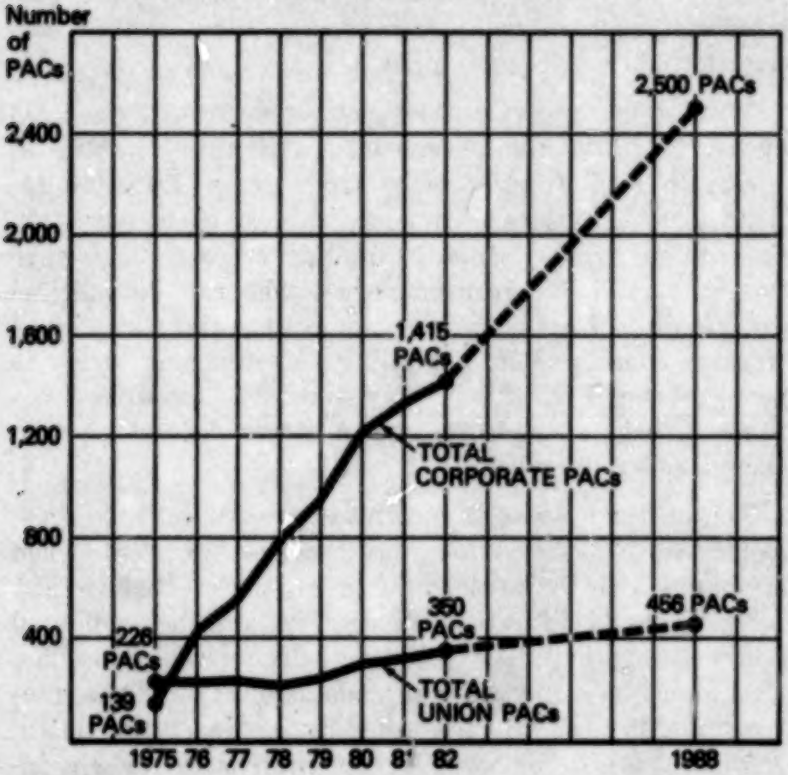
3. *The Explosive Growth of Corporate PACs Under the 1976 Amendments*

The vulnerability of career employees to the employment-pressured solicitations reflected in the present record is underscored by the dramatic growth in corporate Political Action Committees since Congress allowed career employee solicitations under the 1976 amendments. A 918% growth since 1975 in corporate Political Action Committees is reflected in Figure 1—a testimonial to the economic power which corporations can exert on career employees to build political funds while unions remain restricted to member donations.[3]

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[3] Further underscoring the employment-derived origin of the growing corporate PAC treasuries are the unprecedented percentages of donating employees and the amounts of their donations. Thus, in Presidential election years, when interest is at its peak, only 9% of adult Americans contribute to any candidate (I. 1603, F.82); yet among all solicited career employees at Eaton the contribution rate has reached 50%, and among the other three corporations subject to discovery contribution rates range between 60% and 90% of upper echelon employees (F. 66, 69, 72, 77, 79). Moreover, the average 1980 employee contribution to the PAC sponsored by Dart Industries was $1,030 and among senior employees reached $1,435 (F. 74, 75); in contrast the average contribution to Presidential candidates in 1980 was $49.50 (F. 84). Considering that the monies are spent in the corporation's discretion for candidates from both parties, usually in races far removed geographically from the donating employee's voting residence, it is clear that the employment relationship is the gear that is driving the explosive growth in corporate PACs since corporations were freed by the 1976 law to solicit their career employees.

FIGURE 1.
GROWTH OF CORPORATE AND UNION POLITICAL ACTION COMMITTEES*



*1988 projections are extrapolated from 1975-1982 growth rates. 1982 figures are those released by the FEC in July 1982.

Yet the infusion into federal elections since 1976 of corporate PAC funds based on career employee solicitation has only begun. Many corporations have been slow to grasp the significance of the new means presented for corporate domination of federal elections which threatens to overwhelm the limited participation allowed by the law to organized labor. Although there are some 24,000 corporations in the nation each with assets of ten million

dollars or more, there are currently only 1,415 Political Action Committees sponsored by American corporations (FEC Press Release, July 12, 1982). Moreover, the majority of the *largest* corporations have not yet joined the bandwagon—two-thirds of Fortune's 1000 leading corporations do not yet have a PAC (I. 1604, 1605).

With so many corporations not yet exercising the PAC option, there remains an enormous untapped potential in corporate PAC funds derived from career employee solicitations. The several hundred largest corporations in the nation employ some 19 million workers and have nearly a million career employees who can be solicited for corporate PAC money; assuming that those employees were to contribute at prevailing contribution rates, the potential for PAC funds that could be pressured from those corporate employees for a single federal election exceeds 503 million dollars.[4]

The political power of such massive sums solicited from employees by their employers becomes apparent when compared with the present far more modest (but rapidly increasing) PAC funds of corporations and their affiliated trade associations. In the 1980 election $63.9 million were spent by corporate and trade association PACs, representing 49% of *all* PAC spending in the election (Item 1302). Those funds were largely contributed to win in-

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[4] The total employment force of those largest American corporations is 18.9 million workers (Bureau of Census, "General Report on Industrial Organization" (1981) p. 146). Among the four corporations subject to discovery below, 4.8% to 8.4% of their total employment forces fall within the "executive or administrative employee" exception (F. 148). Applying a conservative 5% estimate to the largest American corporations reveals that they can solicit some 945,000 employees without limitation. And those corporations would have available some $508 million if each of those employees contributed $553 (the average amount obtained in 1980 by Dart, United Technologies and Winn-Dixie from contributing employees, F 74, 76, 78).

fluence in the Congress for business interests—the PACs of corporations and business-related trade associations contributed most heavily to committee chairmen or ranking minority members, many of whom did not even have significant election opposition. For example, these PACs gave Senate Finance Committee Chairman Russell Long $409,000 of his $518,000 in PAC monies, and gave Robert Dole, the Committee's ranking minority member, $255,000 or over three-fourths of the total PAC funds he received (Common Cause, *Money, Power and Politics in the 97th Congress* (1981), pp. 74-81). The corporations and business-related groups gave $170,000—some 78% of his PAC donations—to Strom Thurmond, now Chairman of the Senate Judiciary Committee who received 78% of the popular vote in his reelection (*id.* at 92-97). Jake Garn, now Chairman of the Senate Banking Committee, received $192,000 from business PACs (representing 80% of his PAC contributions), and won with 74% of the popular vote (*id.* at 44-50). Jamie Whitten, Chairman of the House Appropriations Committee, got 74% of his PAC money from business PACs and won with 63% of the popular vote (*id.* at 159-63). Congressman Rostenkowski, Chairman of the Ways and Means Committee and also the Joint Committee on Taxation, won 84% of the re-election ballots but still received $106,000 from business PACs (*id.* at 224-29).[5]

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[5] Entire committees are flooded with business PAC money because of their influence on economic legislation although their members face little election opposition. In 1980, of 30 members of the House Ways and Means Committee who collectively received $1.7 million dollars from business-related PACs, 15 won reelection with majorities ranging from 66% to 97% of the popular vote (see Public Citizens' Congress Watch, "Supply Side Economics: Campaign Contributions to the House Ways and Means Committee, 1979-80"). Seeking to maintain its statutory price supports, the dairy industry contributed $3.1 million to Congressional campaigns between 1977 and 1980, primarily to members of the Agriculture committees; during their 1979-80 campaigns members of the House Agriculture Committee received $213,000 from three of the largest dairy industry trade associations (see *Washington Post*, March 6, 1981, p. C16).

4. *The Ruling Below*

By its approval of unprecedented employee solicitation methods that have inherently coercive force, the ruling below simultaneously sacrifices employee liberty of political abstention and aggravates the statutory imbalance in the PAC capacity of corporations and unions. Under the 1976 amendments corporations and labor organizations nominally remain singled out for a ban on federal election use of their institutional funds. But while unions are only permitted to use PAC funds voluntarily contributed by their constituent members, corporations are freed to solicit not only their constituent stockholders but also to reach deep into the ranks of their career employees. Ignoring the extensive documentation and findings in the record that major corporations use institutional power to exploit the vulnerable position of such career employees through inherently coercive methods of PAC solicitation, the court below embraces the FEC's *laissez faire* reading of the statute and upholds the law as thus construed. Thereby it allows corporate employees to be saddled with the burden of their employer's political needs when they are subjected to employment-related pressures for PAC payments. The vulnerable career employee is constrained to feed the hand that feeds him by such compulsive methods as small group solicitation meetings, admonitions that employee loyalty requires contributions to the fund, saturation solicitations from highest level officers, demands by superiors to answer to them for failure to contribute, and such blatant appeals for employee kickbacks as personal solicitation letters from the supervisor delivered to each employee with his annual bonus.

The ruling below, however, never pauses to consider the stipulated evidence documenting such inherently coercive methods of solicitation. Yet donations that result from such solicitation methods clearly reflect the fact of the employment relationship and the unique power of corporations under the statute to build political funds upon that relationship. In approving the use of solicitation

methods that exploit the employment relationship to undermine employee freedom of choice, the ruling below sacrifices vital political liberties. At the same time it aggravates the statute's imbalanced regulation of corporate and union electoral activity, when unions remain confined to membership donations while corporations can solicit not only their stockholders but also invoke the power of the employment relationship to pressure career employee payments to the political fund.

SUBSTANTIAL FIRST AND FIFTH AMENDMENT ISSUES ARE HERE PRESENTED FOR REVIEW

1. *The inequality which the court below upholds in the federal election participation rights of corporations and unions, presents serious First and Fifth Amendment issues.* In rejecting the union's claim of unequal statutory regulation, the court below errs in its refusal to apply the "compelling interest" standard to a statute that severely restricts union participation in federal elections while it allows corporations a far more potent escape from the ban on their institutional participation. Distinguishing *Buckley* as a case involving "limitations on campaign contributions and expenditures," the court below (*infra*, p. 27a) bases its rejection of the strict standard of equal protection on the view that the statute does not "place limits on any individual's speech or participation in the electoral process." But it is, precisely, limits on speech and participation in the electoral process that are here at issue, for the statute bars union contributions and expenditures in federal elections except by means of PAC funds that unions solicit from their members. Thus the court below is quite mistaken in measuring the union's claim of unequal statutory regulation under a standard less rigorous than the compelling interest test, *since there is here a plain and severe statutory limitation on the exercise by unions of their First Amendment right to participate in federal elections.*[6]

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[6] So severe is the limitation that in *UAW* three Justices eschewed constructional avoidance of constitutional doubts and would have

In focusing only on what Congress has *allowed* unions in the area of federal election spending, the court below misses the point that their PAC privilege is but an exception to the statute's general prohibition on union political spending in federal elections—a regulation of union First Amendment rights that clearly invokes the most exacting standard of equal protection. As this Court recently emphasized, "regulation of First Amendment rights is always subject to exacting judicial review" (*Citizens Against Rent Control* v. *Berkeley*, 102 S.Ct. 434, 436 (1982)). Moreover, in the First Amendment area equality of statutory regulation is particularly the constitutional rule (*Metromedia, Inc.* v. *San Diego*, 101 S.Ct. 2882 (1981); *Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Hague* v. *CIO*, 307 U.S. 496 (1939)). The court below thus clearly errs in refusing to apply the compelling interest standard to the union's claim of unequal limitation on union and corporate political spending. As this Court reemphasized in *Buckley*, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office" (424 U.S. at 15). Moreover, the present case involves, as did *Buckley*, not only statutory inhibition on union election contributions but also on union election *expenditures*, to which the compelling interest standard of review should clearly have been applied by the court below. *Citizens Against Rent Control*, 102 S.Ct. at 439.

The lower court's mischaracterization of the statute as if it were merely permissive rather than restrictive of political spending, equally infects its disposition on the merits of the equal protection issue. On that score the court concedes (*infra*, p. 30a) that Congress apparently "did not consider the difference in capacity between corporate and labor PACs," when in the 1976 amendments "it allowed corporations to solicit not only stockholders

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invalidated the limitation as "a broadside assault on the freedom of political expression guaranteed by the First Amendment" (352 U.S. at 598).

but also their employees." The court (*infra*, p. 34a) nevertheless proceeds to justify that difference on the ground that Congress is not required to "equalize the voices of corporate and labor PACs." The court below would be correct in that view if Congress had not forbidden unions and corporations to spend their institutional funds in federal elections. But what the court below overlooks here—as much as in its erroneous rejection of the compelling interest standard—is that Congress has entered the field in a highly restrictive fashion by confining unions and corporations in their participation in federal elections. Once unions are thus statutorily *restricted* out of congressional concern for parity between business and labor, the *escape* that Congress provides on either side must also be even-handed. Having added the ban on union election spending under the 1943 and 1947 provisions to the corporate ban in order to achieve parity between business and labor, equal protection requires Congress also to maintain parity for unions in any PAC exceptions it allows to that ban.[7]

In sum, contrary to the lower court's rejection of the equal treatment duty, equality of political spending regulation is the governing constitutional rule here that invalidates unequal limitations on corporate and union election participation. Given the far greater size and power of the business community than that of the union sector, there could be no constitutional justification for imposing more relaxed federal election spending limits on corporations than on unions. No possible compelling interest exists for

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[7] Indeed, the ruling below recognizes (*infra*, p. 17a) that prior to the 1976 amendments the law itself reflected the goal of "equitable balance" and that in 1976 Congress itself recognized the need "to insure even-handed treatment of corporations and labor unions" (*infra*, p. 17a). In that respect the court below (*infra*, p. 21a) quotes Representative Brademas in his emphasis that the 1976 House bill "represents an equitable balance between the rights of corporations and labor unions," but it concedes (*infra*, pp. 20a-21a n.42) that Representative Brademas "believed mistakenly that the 1976 amendments simply restored the *status quo ante*."

the imbalance created in 1976 by provisions confining union federal election participation to funds contributed by member-constituents, while allowing corporations to go beyond their stockholders to solicit deep within the ranks of their numerous and vulnerable career employees.[8]

2. *Sacrificing career employee liberty to abstain from political action, the ruling below endorses the use of employment-related pressures by corporations to obtain employee political payments.* By the lower court's failure to interdict corporate pressure on career employees to donate to the political fund, it sacrifices employee political liberties and renders the more unequal the statutory provisions that confine union election spending to member donations while authorizing corporations to spend both stockholder and employee donations. In that respect the constricted focus of the ruling below only upon the high rates and amounts of career employee donations (*infra*, 37a-39a) obscures the point of the *tainted solicitation methods* used by the corporations in order to induce employees to give "not because of the purpose of the PAC, but because they feel a need to be part of the group" (*supra*, p. 7).

A reasonable statutory interpretation applying this Court's *Pipefitters'* gloss could have avoided the serious First Amendment issue which arises from the lower court's *laissez faire* statutory reading. As the corporations openly concede (F. 25), it is *because* Congress has barred corporations from using their funds in federal

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[8] We need not pause long over the lower court's alternative justification (*infra*, p. 31a) that career employees "will identify with the corporate direction, purpose, and welfare" more than will shareholders and so it was reasonable for Congress to include a right of recourse by the corporation to its career employees for payments to the political fund. However "reasonable" it might be to authorize corporations to solicit their employees, the vulnerability of such employees to entreaties of the employer only underscores the inequality thereby thrust upon unions which are permitted to spend only voluntary donations from their member-constituents.

elections but allowed them to use employee money that their employees are being subjected to employer political solicitations. When Congress has barred corporation federal election expenditures but allowed them an escape hatch through employee solicitation, federal responsibility clearly attaches to the conditions under which the statute makes employees vulnerable to such employer solicitation. Since it is the statute's bar and its exception which together induce corporations to solicit employees for political tribute, the First Amendment clearly applies to the solicitation methods the statute authorizes.

Yet the court below offers no cogent explanation of how the coercive employer pressures here demonstrated could be deemed consistent with long-accepted liberty of abstention from political activity. See *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Elrod* v. *Burns*, 427 U.S. 347 (1976); cf. *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 566 (1973).[9] In seeking somehow to rationalize the practices it deems the statute to authorize, by which corporations squeeze political contributions from employees, the ruling below (*infra*, p. 47a) asserts that government does not "require corporations to set up a PAC and solicit their employees." But this is fiction, for the statute's prohibition on corporate

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[9] In *Letter Carriers*, in upholding a statutory ban on federal employee political activity, the Court noted the danger of psychological pressures by management on an employee asked to give political support (*id.* at 566): "A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than act out their own beliefs." And in terms directly applicable to the present issue the Solicitor General's *Letter Carriers* brief (p. 10) emphasized the danger that "in many instances, the employee might feel that his prospects for job advancement would be enhanced by political activity aligned with his superior's partisan political predilections."

election spending—excepting only spending of PAC donations—*plainly does require* a corporation to solicit its employees if it wants to participate in a federal election —a fact underscored by the explosive growth since the 1976 statutory amendments in corporate PACs built on career employee payments (see *supra*, pp. 10-11). The lower court's constitutional rationalization of the employment-related donation pressures placed on employees thus suffers from the same fatal flaw which infects its disposition of the union inequality claim, for it similarly fails to recognize the force of the underlying spending prohibition to which the PAC fund option is the sole statutory exception.

3. *A third substantial issue arises: whether Congress can validly authorize the use of objecting stockholders' assets to fund the costs of their corporation's PAC operations.* The ruling below construes the statute to permit, without First Amendment impediment, the use by corporations of objecting stockholders' assets to pay the operating costs of the PAC (*infra*, p. 53a). A reasonable construction of the statute avoiding the constitutional issue that thus arises would preserve a balance between the statute's ban on corporate and union election spending, by according a dissenting stockholder the same right to abstain as that extended to a union member who does not wish to support union political expenses. See *Machinists* v. *Street*, 367 U.S. 740 (1961). Such a statutory construction is the more appropriate considering that the Commission itself recognizes the Congressional desire to protect the First Amendment right of stockholders to refrain from supporting political candidates. As stated in the Commission's pending brief to this Court in *FEC* v. *National Right to Work Committee*, No. 81-1506 (pp. 18-19):

> "The second purpose behind § 441b is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support

political candidates to whom they may be opposed. *United States* v. *CIO*, 335 U.S. 106, 113 (1948). This emphasis on ensuring that individuals have the opportunity to make a knowing and voluntary choice before their money is used to support political candidates safeguards the individual's first amendment interest in not being required to contribute to the support of any political candidate against his or her will. It also furthers the important governmental interest in 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government,' by ensuring that each individual makes a personal decision about the political options he or she will support."

Contrary to these well-stated constitutional considerations, the ruling below adopts a construction which invades the First Amendment rights of objecting stockholders by applying their corporate assets to the costs of the political fund's operations. For that result the ruling below purports to find support in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); but as properly noted in the concurring opinion of Judge Edwards (*infra*, p. 56a n.2), in that case "the proposed remedy for the infringement of the right of political abstention was the total silencing of the majority. . . ." Here, on the other hand, what is at stake is not the majority's power to spend funds for politics but only the question whether in order to preserve their established First Amendment liberty of abstention, dissenters are entitled to rebates on account of such expenditures authorized by the statute. Cf. *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977); *Machinists* v. *Street*, *supra*.

Moreover, the rationalization by the court below (*infra*, p. 50a) that the objecting stockholder can take his assets elsewhere is not only legally but also practically fallacious. With so many of the nation's corporations already aboard the PAC bandwagon and with most soon likely to be aboard given the present growth rate (see *supra*, p. 11), the supposed stockholder option to transfer hold-

ings to other corporations that do not spend general assets for PAC costs is not a viable one. Indeed, in the case of stockholder-plaintiff Glover, who acts as a trustee for the placement of IAM employee pension funds, there is even a legal question whether the prudent investment rule of ERISA would permit him freely to shift such funds to other corporations. There is insult added to injury when union member pension funds must be placed with corporations that use objecting stockholders' assets to support a PAC which finances anti-labor candidates in federal elections. Such are the questionable consequences of the lower court's ruling that under the statute objecting stockholders have no recourse against use of their assets to pay the costs of the company political fund.

* * * *

The net result of the three constitutional wrongs of which the plaintiffs complain in this case is a serious asymmetry in the statutory scheme of regulation affecting corporations, unions and non-stock corporations. The asymmetry arises when the statute, as construed and upheld by the court below, confines unions and other organizations to the genuinely voluntary political donations of their constituent-members while corporations are freed to use objecting stockholders' assets for politics and to induce their employees to pay to the political fund by exerting the pressures of the employment relationship. A similar asymmetry arising from a construction of the statute that permits political solicitation beyond an organization's constituent group of members is before this Court on grant of certiorari in No. 81-1506, *National Right to Work Committee* v. *FEC*. The decision there under review permits a non-stock corporation and its PAC to solicit funds from persons with only the most tenuous relationship to the organization, creating thereby significant imbalance in the FECA "constituent" scheme permitting stock corporations to solicit their stockholders and non-stock corporations and unions to solicit their members.

The statute's symmetry is no less threatened here, where the question is not only *who* may be solicited but what *methods* of solicitation may be employed. To permit corporate solicitation of career employees under inherently coercive circumstances while unions are confined to members' voluntary donations is certainly as much a distortion of the symmetrical statutory scheme as it is to permit solicitation of non-members by the Right to Work Committee. As the FEC itself urges in its pending brief in *National Right to Work Committee*, the unifying factor underlying the statute's symmetry is that corporations, unions and unincorporated associations can only solicit their "*constituents*"; section 441b of the Act, says the Commission, is "a constitutional exercise of the power of Congress to regulate the federal election process, which is narrowly drawn to protect the federal election from corruption, while at the same time permitting corporate and union sponsorship of group political activity by their constituents" (p. 13; see also pp. 12, 27, 28). And the FEC's brief goes on to state that corporations and unions are authorized to finance their PACs "only because they are intended to function as a surrogate for the direct political contributions by the organization itself which the statute prohibits. Thus, the statute properly limits separate segregated funds to soliciting contributions only within the sponsoring organization, from those classes of individuals whose interest the corporate or union has a *fiduciary obligation* to represent" (p. 31, emphasis added).

Thus, whether viewed as a matter of statutory construction or of constitutional validity, the necessary hallmark of the Congressional scheme is voluntary political action by *constituents* for whom the corporation or union is the *fiduciary*. We would submit that it is wholly inconsistent with the concepts of constituency and fiduciary obligation for the statute to subject corporate employees to employment-pressured political solicitation, and to subject objecting stockholders to compulsory support of PAC fund costs. And, as we have shown, the departures from

the traditional respect for liberty of political abstention which the lower court here approved renders the more unequal and imbalanced the statute's regulation of corporate and union spending in federal elections.

CONCLUSION

Serious First and Fifth Amendment issues are here presented concerning the operation and even-handedness of important federal election law provisions. As this Court's *Buckley* decision made clear, inadequate consideration has been paid in FECA to fundamental constitutional principles even though Congress may have acted from worthy motives. Here there are presented seminal FECA questions concerning employee and stockholder freedom from coercive political exactions, and concerning the statute's unequal inhibition on union and corporate spending in federal elections. The questions are of substantial constitutional significance and require this Court's plenary review.

Respectfully submitted,

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August 19, 1982